Supreme Court, U. S.

AUG 14 1974

MICHAEL RODAK, JR., CLERK

No. 74-121

In the

Supreme Court of the United States

OCTOBER TERM 1973

In The Matter Of CHICAGOLAND IDEEL CLEANERS, INC., Bankrupt

CRAIG PHELPS, Receiver In Bankruptcy,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

KEVIN J. GILLOGLY
One North LaSalle Street
Suite 865
Chicago, Illinois 60602
Attorney for Petitioner

Of Counsel:
DANIEL C. AHERN
DENNIS E. QUAID

The Scheffer Press, Inc.—(312) 263-6850

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions For Review	2
Statutes Involved	3
Statement Of The Case	3
Reasons For Granting Writ	5
Conclusion	10
Appendix A (Opinion Of Court of Appeals)	1a
Appendix B (Judgment Of Court of Appeals)	6a
Appendix C (Memorandum of District Court)	7a
Appendix D (Statutes)	8a
Appendix E (Order of Bankruptcy Court)	14a

CITATIONS

CASES:

Browne-Chapin Lumber Co. v. *Union National Bank*, 159 Ill. 458, 42 NE 967 (1896)	7
Davis v. *Pringle*, 268 U.S. 315	8
Guaranty Title & Trust Co. v. *Title Guaranty & Surety Co.*, 224 U.S. 152	8
May v. *Henderson*, 268 U.S. 111 (1925)	7
Myers v. *Kinzie*, 26 Ill. 36 (1861)	7
New York, City of v. *United States*, 283 F.2d 829 (2nd Cir. 1960)	6-7
Russell, In Re John M., 318 U.S. 515 (1943)	7

PAGE

Taubel-Scott-Kitzmiller Co. v. *Fox*, 264 U.S. 426 (1924) 6

United General Wood Products Corporation, In Re, 483 F.2d 975 (9th Cir. 1973) 5

United States v. *Randall*, 401 U.S. 513 (1971) 6, 8

Weber v. *Mick*, 131 Ill. 520, 23 NE 646 (1890) 7

Wilson v. *Pearson*, 20 Ill. 81 (1858) 7

STATUTES:

Bankruptcy Act

Section 2 a (21), 11 U.S.C. 11a (21) 3, 7
Section 64, 11 U.S.C. 104 ..... 3, 5
Section 67, 11 U.S.C. 107 ..... 3, 8
Section 70 a, 11 U.S.C. 110 a 3, 7

Internal Revenue Code of 1954

Section 6321, 26 U.S.C. 6321 ..... 3, 5
Section 6331, 26 U.S.C. 6331 ..... 3, 6
Section 6672, 26 U.S.C. 6672 ..... 3, 8

MISCELLANEOUS:

Collier, *Bankruptcy*, Vol. 1, par. 2.78 (14 Ed. 1974) 7

United States Code Congressional and Administrative News, 1966, P. 2462 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1973

No.

In The Matter Of CHICAGOLAND IDEEL CLEANERS, INC., Bankrupt

CRAIG PHELPS, Receiver In Bankruptcy,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION OF CRAIG PHELPS, RECEIVER, FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Craig Phelps, Receiver of Chicagoland Ideel Cleaners, Inc., Bankrupt, petitions this Honorable Court for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

Your Petitioner seeks review of the judgment of the Court of Appeals, dated May 7, 1974, ... F.2d ..... (7th Cir., 1974), reversing the United States District Court for the Northern District of Illinois, Eastern Division, Lynch, J., (not reported), which affirmed the ruling of the Referee in Bankruptcy (now Bankruptcy Judge) (not reported) ordering Nathan Yorke, as assignee for

the benefit of creditors, to turn over to said Receiver the proceeds of the sale of the bankrupt's assets which the assignee conducted prior to the institution of the present bankruptcy proceedings.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on May 7, 1974, and mandate was returned to the District Court on July 15, 1974. A Petition for Rehearing by the Court of Appeals was filed on May 20, 1974, and denied by order dated May 24, 1974.

Jurisdiction to review the judgment of the Court of Appeals is conferred upon this Court by the Bankruptcy Act, Section 24c (11 U.S.C. §47c) and 28 U.S.C. §1254(1).

QUESTIONS FOR REVIEW

First: Whether the Court of Appeals incorrectly granted to the United States a priority based upon the Internal Revenue Code of 1954 for taxes in violation of and contrary to the priorities for payment of claims established by the Bankruptcy Act?

Second: Whether the Court of Appeals incorrectly held that service of a Notice of Levy upon an assignee for the benefit of creditors subsequent to the assignment reduced the bankrupt's property then held by the assignee to the constructive possession of the United States?

Third: Whether the Court of Appeals incorrectly determined that the Bankruptcy Court lacked summary jurisdiction to adjudicate the controversy before it without the consent of the United States?

Fourth: Whether the Court of Appeals incorrectly transferred the burden of proof to the Petitioner to present evidence of the non-existence of assessment and demand upon the bankrupt for payment of the claimed taxes when the United States relied upon the existence of assessment and demand and had knowledge of such facts?

STATUTES INVOLVED

The statutory provisions involved in this case are Sections 2((21) (11 U.S.C. 11a(21)); 64 (11 U.S.C. 104); 67 (11 U.S.C. 107); and 70 (11 U.S.C. 110) of the Bankruptcy Act and Sections 6321, 6331 and 6672 of the Internal Revenue Code of 1954 (26 U.S.C.), all of which are set forth in Appendix D.

STATEMENT OF THE CASE

The bankrupt, Chicagoland Ideel Cleaners, Inc., is an Illinois corporation with its principal place of business in Chicago, Illinois. On June 28, 1971, the directors of the bankrupt corporation executed written consents to a general assignment of its assets for the benefit of creditors and on that date the bankrupt did assign and transfer all of its assets to Nathan Yorke, as assignee for the benefit of creditors. The assignee liquidated the assets of the bankrupt and thereafter, on August 25, 1971, the Internal Revenue Service filed a Notice of Tax Lien with the Recorder of Deeds for the County of Cook, claiming a lien on the property of Chicagoland Ideel Cleaners, Inc., based upon purported assessments of March 12, May 5, May 28 and June 4, 1971, allegedly after demand, in the amount of $140,831.59. On the same date, the Internal Revenue Service effected a Notice

of Levy upon Nathan Yorke, the assignee, without any further effort to reduce the proceeds to its possession.

An involuntary petition in bankruptcy was filed on September 14, 1971 against Chicagoland Ideel Cleaners, Inc., and Craig Phelps was appointed as Receiver on September 24, 1971. Chicagoland Ideel Cleaners, Inc., was adjudged a bankrupt on September 28, 1971.

On October 19, 1971, the Receiver filed an application requesting an order compelling the assignee to surrender and turn over to the Receiver the proceeds of sale in his possession. By way of intervention, the United States answered the Receiver's application against the assignee by asserting that the Bankruptcy Court lacked jurisdiction over the United States and also lacked summary jurisdiction because the United States was entitled to possession of the monies held by the assignee. On December 9, 1971, the Referee in Bankruptcy ordered the assignee to turn over these proceeds to the Receiver. The United States filed a Petition for Review on December 16, 1971. The Referee's order was approved by the United States District Court for the Northern District of Illinois, Eastern Division, on January 11, 1972, whereupon the United States moved to vacate the District Court's order on January 21, 1972. The motion to vacate was denied on March 2, 1972.

A Notice of Appeal to the United States Court of Appeals for the Seventh Circuit was filed on April 28, 1972, on behalf of the United States. The Court of Appeals, on May 7, 1974, reversed the January 11, 1972 order of the District Court approving the decision of the Referee in Bankruptcy. The Receiver filed a Petition for Rehearing which was denied on May 24, 1974. The Receiver respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

The Court of Appeals erroneously decided that the United States gained constructive possession over funds in the hands of an assignee for the benefit of creditors, thereby defeating the summary jurisdiction of the Bankruptcy Court. In doing so, the Court acknowledged that its decision was in conflict with that of the Ninth Circuit, in *In Re United General Wood Products Corporation,* 483 F.2d 975 (9th Cir., 1973). In addition to creating a conflict between Circuits and introducing a degree of uncertainty into this area of law, the decision of the Court also serves to frustrate the policy of the Bankruptcy Act by granting unwarranted priorities for taxes due the United States based upon the Internal Revenue Code which are in conflict with those priorities created by the applicable statutory provision, the Bankruptcy Act.

Section 64 of the Bankruptcy Act, 11 U.S.C. 104, establishes priorities for the payment of creditors. Taxes due to the United States enjoy a fourth priority, following costs of administration, wage claims and certain expenses of a creditor in defeating an arrangement or wage-earner plan. By finding that the Internal Revenue Service constructively possessed the assets held by the assignee for the benefit of creditors, the Court of Appeals upset the system of priorities by holding that the Internal Revenue Service was entitled to a lien pursuant to the Internal Revenue Code of 1954, 26 U.S.C. 6321.

A similar claim was asserted by the United States and rejected in the decision of *In Re United General Wood Products Corporation, supra.* The Ninth Circuit held that constructive possession of the property remained in the bankrupt despite service of a Notice of Levy upon a

factor, relying on *Taubel-Scott-Kitzmiller Co.* v. *Fox,* 264 U.S. 426 (1924), and rejected the argument that a Notice of Levy pursuant to Section 6331 of the Internal Revenue Code, 26 U.S.C. 6331, reduced the property to the possession of the United States. The Ninth Circuit heeded the admonishment of this Honorable Court in *United States* v. *Randall,* 401 U.S. 513 (1971) that the Bankruptcy Act "is an overriding statement of federal policy on this question of priorities" (401 U.S. at 516). The Seventh Circuit failed to follow *United States* v. *Randall, supra,* or the strong policy of the Bankruptcy Act.

The original question before the Bankruptcy Court was whether it possessed jurisdiction to proceed to adjudicate the controversy in a summary manner. In order to resolve the jurisdictional question, the Bankruptcy Court was therefore empowered to decide whether the Court had actual or constructive possession of the property. *Taubel-Scott-Kitzmiller Co.* v. *Fox, supra.* Justice Brandeis held in that decision that the Bankruptcy Court has constructive possession of property not in the possession of the bankrupt where "the property is held by some other person who makes no claim to it; . . ." (264 U.S. at 432-3). In the case at bar, the assigned property was liquidated by the assignee who has never made any claim to the funds in question and did not answer the Receiver's application.

The United States asserts that its Notice of Levy served upon the assignee subsequent to the assignment but prior to the initiation of bankruptcy proceedings entitled it to constructive possession of the property. However, the lien of the United States attaches only to the property belonging to the taxpayer, and the extent of those rights are to be measured by state law. *City of New York*

v. *United States,* 283 F.2d 829 (2nd Cir., 1960). Under Illinois law, a general assignment for the benefit of creditors transfers absolute title to the assignee in his official capacity, as was true in *City of New York. Wilson* v. *Pearson,* 20 Ill. 81 (1858); *Myers* v. *Kinzie,* 26 Ill. 36 (1861); *Weber* v. *Mick,* 131 Ill. 520, 23 N.E. 646 (1890); and *Browne-Chapin Lumber Co.* v. *Union National Bank,* 159 Ill. 458, 42 N.E. 967 (1896). Consequently, when the Notice of Levy was served, there no longer existed any interest of the taxpayer upon which the lien could attach and possession either actual or constructive of the proceeds in the hands of the assignee did not pass to the United States. Upon filing of the Bankruptcy Petition, possession came to the Bankruptcy Court, and in that manner, supported the exercise of summary jurisdiction.

In addition to the above basis for the Bankruptcy Court's exercise of summary jurisdiction, specific provisions of the Bankruptcy Act authorized such proceedings. Section 2a(21), 11 U.S.C. 11a(21), creates Courts of Bankruptcy invested with jurisdiction to require an assignee for the benefit of creditors to deliver the property in his possession or control to the Receiver or Trustee appointed by the Bankruptcy Court. The jurisdiction conferred by this section is summary in nature. *May* v. *Henderson,* 268 U.S. 111 (1925); *In Re John M. Russell,* 318 U.S. 515 (1943); and Collier, *Bankruptcy,* Vol. 1, Par. 2.78 (14 Ed.). As an intervening party, the United States is bound by the proceedings as they exist and should not be permitted to alter their nature. Section 70a(8), 11 U.S.C. 110a(8), is a second provision providing for the exercise of summary jurisdiction over property held by an assignee for the benefit of creditors. These two provisions further demonstrate the fact that Congress intended disputes involving property held

by an assignee to be resolved summarily in order to aid the administration of the bankruptcy estate.

Section 67c, 11 U.S.C. 107c, specifically involves tax liens, their validity and priority. Subdivision (3) of the section provides that tax liens on personal property not accompanied by possession shall be postponed to payment of costs of administration and wage claims, in effect, thus giving such tax liens a third rather than a fourth priority. The effect of the Court of Appeals' decision is to erroneously grant to the United States a first priority before costs of administration and wage claimants. The clear policy of the Bankruptcy Act has been to subordinate tax claims to the allowance of costs of administration. *Guarantee Title & Trust Co.* v. *Title Guaranty & Surety Co.*, 224 U.S. 152; *Davis* v. *Pringle*, 268 U.S. 315; and *United States* v. *Randall, supra.* Paragraph c of Section 67 was added to the Act to further this policy when liens for taxes were involved. Subdivision c(3) thereof was intended to protect the existing set of priorities from non-possessory tax liens. 1966 U.S. Code Cong. and Admin. News, p. 2462. Congress has determined that those individuals whose efforts have benefited the administration of the affairs of the bankrupt and the accumulation of an estate available for distribution should not have labored without hope of compensation. More importantly, wage claimants are also sought to be protected in their second class priority by Section 67c(3). Perhaps more than anyone else, wage claimants are particularly dependent upon the recovery of their claims in order to provide for the necessities of life. The effect of the ruling of the Court of Appeals will be to deprive these individuals of any recovery, contrary to the policy considerations established by Congress. *Id.* If the wage claimants are to be paid, their

right to priority of payment must be preserved by this Court. This is their only chance of recovery, whereas the United States has a third priority plus its right to assert the personal liability of the officers of the bankrupt corporation for payment, as contained within Section 6672 of the Internal Revenue Code of 1954, 26 U.S.C. 6672. Congress has adequately provided for the protection of the respective rights of all parties involved through the provisions of the Bankruptcy Act and the Internal Revenue Code. If an apparent conflict arises between the two statutory measures involving priority of payment, the act dealing more specifically with the subject should control. The Bankruptcy Act is that measure wherein Congress carefully weighed the rights of the different parties and established a system of priorities. That system should not be upset through the means of the tenuous theory of the United States which has been rejected by the Ninth Circuit.

No competent evidence of the assessments or demand within sixty days thereafter was presented. The Court of Appeals accepted the printed recitations contained within the Notice of Tax Lien and Notice of Levy that assessment and demand had been made and cast the burden upon the Petitioner to show otherwise. The United States relied upon the existence of assessment and demand for the basis of its claim of a lien and is the party having knowledge of whether these procedures were properly taken. It was incumbent upon the United States to go forward and present evidence on this issue and this they failed to do. The Receiver did not have access to such information, did not rely upon it and could not present evidence of a negative. The Court of Appeals erred in accepting this fact as being established by the record.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

KEVIN J. GILLOGLY
One North LaSalle Street
Suite 865
Chicago, Illinois 60602
Attorney for Petitioner

Of Counsel:
DANIEL C. AHERN
DENNIS E. QUAID

APPENDIX A

In The
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

SEPTEMBER TERM, 1973 — JANUARY SESSION, 1974

No. 72-1620
In the Matter of Chicagoland Ideel Cleaners, Inc., Bankrupt
United States Of America,
Appellant,
v.
Craig Phelps, Receiver in Bankruptcy,
Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 71 B 5396
WILLIAM J. LYNCH, *Judge.*

HEARD FEBRUARY 13, 1974 — DECIDED MAY 7, 1974

Before HASTINGS, *Senior Circuit Judge*, CUMMINGS and STEVENS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* Taxpayer, Chicagoland Ideel Cleaners, Inc., is an Illinois corporation with its principal place of business in Chicago. In March 12, May 21, May 28, and June 4, 1971, assessments were made against the taxpayer totaling $140,831.59 for withholding and federal unemployment taxes for periods from September 30, 1970, to March 31, 1971. On June 28, 1971, pursuant to the written consents of its directors, taxpayer assigned

and transferred all of its assets to Nathan Yorke as assignee for the benefit of its creditors. Thereafter Yorke proceeded to liquidate its assets. On August 25, 1971, the Internal Revenue Service filed in the office of the Recorder of Deeds of Cook County, Illinois, a notice of tax lien with respect to the taxes previously assessed and on the same date served a notice of levy on assignee Yorke. The notice of tax lien indicated that the $140,831.59 in taxes had been assessed against taxpayer and that after demand for payment, the taxes remained unpaid. The notice of levy stated that the taxpayer's properties "are hereby levied upon and seized for satisfaction" of the taxes.

On September 14, 1971, an involuntary petition for bankruptcy was filed in the court below, and a receiver was appointed ten days thereafter. The taxpayer was adjudged bankrupt on September 28, 1971.

Three weeks thereafter, the receiver filed an application for an order requiring assignee Yorke to turn over all of taxpayer's assets to the receiver. The Government urged that the bankruptcy court lacked summary jurisdiction to grant the application on the ground that possession of the property held by the assignee had been in the United States since August 25, 1971, when it filed its notice of tax lien and served its notice of levy upon assignee Yorke. However, on December 9, 1971, the referee in bankruptcy ruled that assignee Yorke held "inalienable title" to the taxpayer's assets and that the Internal Revenue Service's notice of levy was a "nullity." Therefore, he ordered the assignee to turn over to the receiver all of taxpayer's assets in the assignee's possession. After considering the Government's petition for review of the referee's order, the district court approved the order on January 11, 1972, and reaffirmed its approval on March 2, 1972. We reverse.

Here the four tax assessments against the taxpayer occurred in March, May and June 1971. The notice of tax lien and the notice of levy both recite that the taxes

remained unpaid after demand.[1] These notices are regular on their face. Where, as here, the receiver has not come forward with any evidence suggesting that demands were not made, we will accept the recitations in the notices. Therefore, by virtue of Sections 6321 and 6322 of the Internal Revenue Code,[2] the Government's liens arose and attached to taxpayer's property on the dates of assessment and demand. The liens were thereafter valid and perfected against all persons except purchasers, holders of security interests, mechanic's lienors or judgment lien creditors, and the liens became effective against those four classes when the notice of tax lien was filed on August 25, 1971, 26 U.S.C. § 6323(a). The receiver does not assert that assignee Yorke is in one of the four protected classes.

Under Treasury Regulation § 301.6331-1(a), "Levy may be made by serving a notice of levy * * *." This regulation does not go beyond the authority of the statute, which provides: "The term 'levy' as used in this title includes the power of distraint and seizure *by any means.*"

[1] The demands had to be made within 60 days of the assessments. 26 U.S.C. § 6303(a).

[2] Section 6321 provides:

> "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

Section 6322 provides:

> "Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time."

26 U.S.C. § 6331(b) (emphasis supplied). The regulation was implemented by the notice of levy served on assignee Yorke August 25, 1971, which advised him that taxpayer's properties "are hereby levied upon and seized • • •." Thus about three weeks prior to the filing of the bankruptcy petition the property levied upon was reduced to possession of the United States superior to that of the receiver. See *United States* v. *Pittman*, 449 F.2d 623, 627 (7th Cir. 1971); *Rosenblum* v. *United States*, 300 F.2d 843 (1st Cir. 1962); *United States* v. *Eiland*, 223 F.2d 118 (4th Cir. 1955); see also *Youngstown S. & T. Co.* v. *Patterson-E.-C. of Ind.*, 227 F.Supp. 208, 217 (N.D.Ind. 1963); *Consumers Power Co.* v. *Rubiner*, 225 F.Supp. 926, 929 (E.D. Mich. 1963); *United States* v. *Manufacturers National Bank*, 198 F.Supp. 157 (N.D.N.Y. 1961); *In re Venda Manufacturing, Inc.*, 60-2 U.S. Tax Cas., ¶ 9480 (S.D. Cal. 1960).

The receiver insists that actual possession is necessary to remove the Government's tax liens from the subordinate priority accorded them under Section 67c(3) of the Bankruptcy Act.[3] However, *Eiland* and *Rosenblum* are squarely

[3] Section 67c(3) provides:

"Every tax lien on personal property not accompanied by possession shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act. Where such a tax lien is prior in right to liens indefeasible in bankruptcy, the court shall order payment from the proceeds derived from the sale of the personal property to which the tax lien attaches, less the actual cost of that sale, of an amount not in excess of the tax lien, to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act. If the amount realized from the sale exceeds the total of such debts, after allowing for prior indefeasible liens and the cost of the sale, the excess up to the amount of the difference between the total paid to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act and the amount of the tax lien, is to be paid to the holder of the tax lien." 11 U.S.C.A. § 107(c)(3) (1974 Supp.).

to the contrary with respect to intangibles (such as involved here) and we consider them persuasive. As Judges Parker and Woodbury there pointed out, contrary cases relied upon by the present taxpayer dealt either with tangible property or with different language contained in the Internal Revenue Code of 1939 or state tax laws. See *Givan* v. *Cripp*, 187 F.2d 225 (7th Cir. 1951); *United States* v. *Odell*, 160 F.2d 304 (6th Cir. 1947); *City of New York* v. *Hall*, 139 F.2d 935 (2d Cir. 1944); see also *Division of Labor Law Enforcement* v. *Goggin*, 165 F.2d 155 (9th Cir. 1947), reversed on other grounds, 336 U.S. 118. It is also significant that even *Givan* and *Odell* recognized that possession could be either actual or constructive. Those cases contemplated that the levy would be complete when the Government had served a warrant of distraint in addition to its notice of levy. We see no reason why the language necessary to create constructive possession may not be printed in full on one piece of paper. Historically, service of notice has been sufficient to seize a debt. *Miller* v. *United States*, 78 U.S. 268, 297. Finally, Judge Pell's careful discussion in *Pittman* demonstrates that under the Internal Revenue Code, levy is equivalent to seizure and gives the Government full legal rights in the property levied upon. 449 F.2d at 627.

Since possession of the property resided in the United States as against the receiver, the bankruptcy court lacked jurisdiction summarily to adjudicate the controversy without the Government's consent. *Cline* v. *Kaplan*, 323 U.S. 97, 99; *In re American National Trust*, 426 F.2d 1059, 1065 (7th Cir. 1970). The United States is now entitled to have its claim adjudicated in a plenary suit. We respectfully decline to follow the contrary holding in *In re United General Wood Products Corp.*, 483 F.2d 975 (9th Cir. 1973).

The district court's order approving the turnover order is reversed.

APPENDIX B

Opinion by Judge Cummings
UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604
May 7, 1974
Before
Hon. John S. Hastings, Senior Circuit Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. John Paul Stevens, Circuit Judge

No. 72-1620

In the Matter of Chicagoland Ideel Cleaners, Inc., Bankrupt

United States Of America,
Appellant,

v.

Craig Phelps, Receiver in Bankruptcy,
Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order approving the turnover order of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, in accordance with the opinion of this Court filed this day.

IT IS FURTHER ORDERED that costs be taxed in favor of the United States of America.

APPENDIX C

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division
Name of Presiding Judge, Honorable William J. Lynch
Cause No. 71 B 5396 Date Jan. 11, 1972
Title of Cause
In The Matter of Chicagoland Ideel Cleaners, Inc.
Brief Statement of Motion
Petition for Review

ORDER: After careful review, the findings of fact, conclusions of law as submitted to this Court by the referee, the order is approved in every respect.

APPENDIX D

"Bankruptcy Act, 11 U.S.C. 1, et seq."

Section 2a. CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—

(21) Require receivers or trustees appointed in proceedings not under this Act, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate a person's property to deliver the property in their possession or under their control to the receiver or trustee appointed under this Act or, where an arrangement or plan under this Act has been confirmed and such property has not prior thereto been delivered to a receiver or trustee appointed under this Act, to deliver such property to the debtor or other person entitled to such property according to the provisions of the arrangement or plan, and in all such cases to account to the court for the disposition by them of the property of such bankrupt or debtor: *Provided, however,* That such delivery and accounting shall not be required except in proceedings under section 77 and chapters X and XII of this Act, if the receiver or trustee was appointed, the assignment was made, or the agent was authorized more than four months prior to the date of bankruptcy. Upon such accounting, the court shall reexamine and determine the propriety and reasonableness of all disbursements made out of such property by such receiver, trustee, assignee, or agent,

either to himself or to others, for services and expenses under such receivership, trusteeship, assignment, or agency, and shall, unless such disbursements have been approved, upon notice to creditors and other parties in interest, by a court of competent jurisdiction prior to the proceeding under this Act, surcharge such receiver, trustee, assignee, or agent the amount of any disbursement determined by the court to have been improper or excessive; and . . .

Section 64. DEBTS WHICH HAVE PRIORITY. a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the costs and expenses of administration, including the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; the fees for the referees' salary and expense fund; the filing fees paid by creditors in involuntary cases or by persons other than the bankrupts in voluntary cases; where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, is recovered for the benefit of the estate of the bankrupt by the efforts and at the cost and expense of one or more creditors, the reasonable costs and expenses of the recovery; the trustee's expenses in opposing the bankrupt's discharge or in connection with the criminal prosecution of an offense punishable under chapter 9 of title 18 of the United States Code, or an offense concerning the business or property of the bankrupt punishable under other laws, Federal or State; the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the bankrupt in voluntary and involuntary cases, and to the petitioning creditors in involuntary cases, and if the court adjudges the debtor bankrupt over the debtor's objection or pursuant to a voluntary petition filed by the debtor during the pendency of an involuntary proceeding, for the reasonable costs and expenses incurred, or the

reasonable disbursements made, by them, including but not limited to compensation of accountants and appraisers employed by them, in such amount as the court may allow. Where an order is entered in a proceeding under any chapter of this Act directing that bankruptcy be proceeded with, the costs and expenses of administration incurred in the ensuing bankruptcy proceeding, including expenses necessarily incurred by a debtor in possession, receiver, or trustee in preparing the schedule and statement required to be filed by sections 238, 378, or 483, shall have priority in advance of payment of the unpaid costs and expenses of administration, including the allowances provided for in such chapter, incurred in the superseded proceeding and in the suspended bankruptcy proceeding, if any; (2) wages and commissions, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; and for the purposes of this clause, the term "traveling or city salesman" shall include all such salesmen, whether or not they are independent contractors selling the products or services of the bankrupt on a commission basis, with or without a drawing account or formal contract; (3) where the confirmation of an arrangement or wage-earner plan or the bankrupt's discharge has been refused, revoked, or set aside upon the objection and through the efforts and at the cost and expense of one or more creditors, or, where through the efforts and at the cost and expense of one or more creditors, evidence shall have been adduced resulting in the conviction of any person of an offense under Chapter 9 of Title 18 of the United States Code, the reasonable costs and expenses of such creditors in obtaining such refusal, revocation, or setting aside, or in adducing such evidence; (4) taxes which became legally due and owing by the bankrupt to the United States or to any State or any subdivision thereof which are not released by a discharge in bankruptcy; *Provided, however,* That no

priority over general unsecured claims shall pertain to taxes not included in the foregoing priority: *And provided further,* That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court; and (5) debts other than for taxes owing to any person, including the United States, who by the laws of the United States is entitled to priority, and rent owing to a landlord who is entitled to priority by applicable State law or who is entitled to priority by paragraph (2) of subdivision c of Section 67 of this Act: *Provided, however,* That such priority for rent to a landlord shall be restricted to the rent which is legally due and owing for the actual use and occupancy of the premises affected, and which accrued within three months before the date of bankruptcy.

Section 67c(3). Every tax lien on personal property not accompanied by possession shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act. Where such a tax lien is prior in right to liens indefeasible in bankruptcy, the court shall order payment from the proceeds derived from the sale of the personal property to which the tax lien attaches, less the actual cost of that sale, of an amount not in excess of the tax lien, to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act. If the amount realized from the sale exceeds the total of such debts, after allowing for prior indefeasible liens and the cost of the sale, the excess up to the amount of the difference between the total paid to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act and the amount of the tax lien, is to be paid to the holder of the tax lien.

Section 70a. TITLE TO PROPERTY. The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of

the petition initiating a proceeding under this Act, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located . . . (8) property held by an assignee for the benefit of creditors appointed under an assignment which constituted an act of bankruptcy, which property shall, for the purposes of this Act, be deemed to be held by the assignee as the agent of the bankrupt and shall be subject to the summary jurisdiction of the court.

"Internal Revenue Code of 1954, 26 U.S.C."

Section 6321. Lien for taxes

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. Aug. 16, 1954, c. 736, 68 A Stat. 779.

Section 6331. Levy and distraint

(a) Authority of Secretary or delegate—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401 (d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and

demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

Section 6672. Failure to collect and pay over tax, or attempt to evade or defeat tax

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable. Aug. 16, 1954, c. 736, 68 A Stat. 828.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In The Matter Of Chicagoland Ideel Cleaners, Inc., Bankrupt.	In Bankruptcy No. 71 B 5396

ORDER

At Chicago, Illinois, in said Division and District aforesaid, before the Honorable Charles B. McCormick, Referee in Bankruptcy, this 9th day of December, A.D., 1971:

This matter, CHICAGOLAND IDEEL CLEANERS, INC., as such assignee, and the answer thereto of the United States of America and the court having heard argument of counsel in open court and having considered the brief and memorandum submitted by the parties, finds:

That the court has jurisdiction of the parties and subject matter herein.

That Nathan Yorke is holding certain sums of money acquired by him as assignee for the benefit of the creditors of CHICAGOLAND IDEEL CLEANERS, INC., said assignment taking place prior to the service of notice of levy by the Internal Revenue Service upon said assignee.

That the notice of levy was served on the assignee on August 25, 1971 and on September 14, 1971 the involuntary petition in bankruptcy was filed herein and the receiver appointed and that adjudication has been entered.

That the notice of levy claimed all property rights to property monies, credits and bank deposits now in possession of and belonging to CHICAGOLAND IDEEL CLEANERS, INC.

That the notice of levy of the Internal Revenue Service herein could attach a lien only upon such interest as the taxpayer had in the property levied upon.

That the assignment for the benefit of creditors passed inalienable title to the assets of CHICAGOLAND IDEEL CLEANERS, INC., to the assignee for the benefit of its creditors.

That the notice of levy of the Internal Revenue Service is a nullity as it pertains to the bankrupt estate.

WHEREFORE IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Nathan Yorke surrender and turn over to Craig Phelps, Receiver herein, any and all sums in his possession which were acquired by and through his performance as an assignee for the benefit of the creditors of the bankrupt herein.

Enter:

/s/ Charles B. McCormick
Referee in Bankruptcy

CORRECTED

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604
May 24, 1974

Before
Hon. JOHN S. HASTINGS, SR. *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*

In the Matter of:
CHICAGOLAND IDEEL CLEANERS, INC.,
Bankrupt,
Appellee,
No. 72-1620 vs.
UNITED STATES OF AMERICA,
Petitioner-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
(71 B 5396)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be, and the same is hereby, DENIED.